THE PRIVILEGE OF THE ACCUSED TO REFUSE TO TESTIFY

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The extent and character of public criticism of our courts may well be regarded a thermometer registering the degree of success with which our law is administered. The writer proposes to consider at the outset, how the privilege of the accused to refuse to testify affects the administration of the law, and to what extent it may be responsible for criticism of the courts.

The importance of dispensing justice is no greater than the importance of satisfying the community that justice is dispensed. There is no such thing as absolute justice. Our standards are always more or less artificial. They are merely the expression of our ever changing view of public morals and of public and private right. In a sense law is justice, and as we change our law we change our justice; indeed our statutes as well as our judge-made law represent merely the standard of morality adopted for the time being. That is why the public opinion of the administration of the law is so important, and why it may be of interest to analyze briefly some phases of the common criticism of our courts. This may enable us to discern specific weaknesses and the remedy therefor.

The object of every trial, whether civil or criminal, is to ascertain the truth. In the final analysis every case presents a simple question, to which the courts are called upon to give a categorical answer. This question is: Are the facts stated in the "complaint" in a civil case, or in the "indictment" in the criminal case true? That is the sole question that a jury is called upon to answer, and from the answer flow the legal consequences prescribed by our then system of law and morals. Our rules of procedure in themselves amount to nothing more than the method adopted for the sake of convenience and regularity, by which the jury's answer to this question may be secured. If they assist toward a correct ascertainment of the facts, they may generally be regarded as good rules; if they tend toward suppressing the truth or toward rendering a correct determination of

the issue more uncertain, they are inherently unsound. The great cry against the "law's delays" is but one phase of this question. "Justice delayed is justice defeated" is a trite, but in the main truthful statement; not primarily true because delay may inconvenience the individual or the state, nor because delay in itself may frequently occasion hardship, but chiefly because it renders a truthful verdict more uncertain. In fact the most severe criticism to which our courts are ordinarily subjected is that they do not dispense justice, i.e., that our system is not conducive towards reaching a truthful verdict.

In criminal cases the criticism is most frequently made that the guilty escape conviction. The converse—that the innocent are convicted—has doubtless been true in some cases, but these are sporadic and the result in nearly every instance of intense temporary local feeling. However deplorable, these cases are exceptional and cannot be regarded as an indictment of our law or of our system of procedure.

No system has yet been found which will always bring about a correct determination of the facts. The jury system seems to come closer to the ideal than any other, yet it is impossible wholly to remove passion, prejudice or improper considerations from all juries, just as it is impossible to select only perfect judges.

The chief complaint against our system in criminal cases, however, seems to be that there is a large percentage of miscarriages of justice, in cases where the accused is acquitted. Most juries endeavor to reach a conscientious and truthful result. If then, there is any considerable percentage of failures to reach that result, we are confronted with the question whether all of the available evidence has been presented to the jury, and, if not, whether artificial laws or rules of procedure prevent the jury from considering relevant testimony which would assist in reaching a truthful determination of the issues. It is from this point of view that a consideration of our constitutional provision that no man shall be compelled to incriminate himself may well be approached.

The elimination of the accused as a compulsory witness necessarily involves that the prosecution is prevented from presenting evidence which would throw light upon the question at issue. This is so whether the accused be guilty or innocent, for his evidence would tend to show either his innocence or his guilt, and thus assist in its

determination by the jury. In fact the accused is frequently, from the nature of the situation, the one best qualified to give testimony which will determine the truth, yet under our present constitutional provisions he may not be called as a witness. It may even happen —indeed frequently does happen—that the accused is the sole eye-witness of the occurrence, yet the jury are thus deprived of his direct testimony and may be compelled to determine the case wholly upon circumstantial evidence. The proposition that our constitutional prohibition against compelling the accused to testify eliminates relevant testimony does not require further elaboration, for it is practically axiomatic.

Having reached the conclusion that our constitutional rule deprives the jury of relevant testimony, and at times of the best evidence of which a case is capable, and therefore tends to make a correct determination more uncertain, we are next called upon to consider whether there are controlling reasons which should nevertheless induce us to retain the principle of immunity from self-incrimination without change.

And first we may, with propriety, consider whether there is any inherent injustice in compelling the accused to give evidence against himself. This question has been discussed for many years by jurists of distinction. It has been suggested by some that it is inherently unjust to compel the accused to testify against himself, i.e., to furnish evidence upon which his own conviction may be based. Nowhere will be found a more complete refutation of these arguments than in Jeremy Bentham's *Rationale of Judicial Evidence* (1827). Jeremy Bentham labels the two chief arguments of the alleged "injustice" "The old woman's reason" and "The fox-hunter's reason" and expresses himself in part as follows:

> *The old woman's reason.* The essence of this reason is contained in the word "hard:" 'tis hard upon a man to be obliged to criminate himself. Hard it is upon a man, it must be confessed, to be obliged to do anything that he does not like. That he should not much like to do what is meant by his criminating himself, is natural enough; for what it leads to is his being punished. What is no less hard upon him is that he should be punished; but did it ever yet occur to a man to propose a general abolition of all punishment, with this hardship for a reason for it? Whatever hardship there is in a man's being punished, that, and no more, is there in his thus being made to criminate himself, with this difference, that when he is punished,—punished he is by the very supposition; whereas, when he is thus made to criminate

himself, although punishment may ensue, and probably enough will ensue, yet it may also happen that it does not.

What, then, is the hardship of a man's being thus made to criminate himself? The same as that of his being punished; the same in kind, but inferior in degree; inferior, in as far as in the chance of an evil there is less hardship than in the certainty of it. Suppose, in both cases, conviction to be the result: does it matter to a man, would he give a pin to choose, whether it is out of his own mouth that the evidence is to come, or out of another's?

To this, to which, in compliance with inveterate and vulgar prejudice, I have given the name of the old woman's reason, I might, with much more propriety, give the name of the lawyer's reason. . . . . Nor yet is all this plea of tenderness—this double-distilled and treble-refined sentimentality, anything better than a pretence. From his own mouth you will not receive the evidence of the culprit against him; but in his own hand, or from the mouth of another, you receive it without scruple; so that at bottom, all this sentimentality resolves itself into neither more nor less than a predilection—a confirmed and most extensive predilection, for evidence, the badness of which you yourselves proclaim, and ground arguments and exclusions upon in a thousand cases.

The fox-hunter's reason. This consists in introducing upon the carpet of legal procedure the idea of "fairness," in the sense in which the word is used by sportsmen. The fox is to have a fair chance for his life; he must have (so close is the analogy) what is called "law"—leave to run a certain length of way for the express purpose of giving him a chance for escape. While under pursuit, he must not be shot; it would be as "unfair" as convicting him of burglary on a henroost in five minutes' time, in a court of conscience. In the sporting code, these laws are rational, being obviously conducive to the professed end. Amusement is that end; a certain quantity of delay is essential to it; dispatch, a degree of dispatch reducing the quantity of delay below the allowed minimum, would be fatal to it. . . . . To different persons, both a fox and a criminal have their use; the use of a fox is to be hunted; the use of a criminal is to be tried. . . . .

Confounding interrogation with torture; with the application of physical suffering, till some act is done—in the present instance, till testimony is given to a particular effect required. On this occasion it is necessary to observe, that the act of putting a question to a person whose station is that of defendant in a cause, is no more an act of torture than the putting the same question to him would be, if, instead of being a defendant, he were an extraneous witness. Whatever he chooses to say, he is at full liberty to say; only under this condition, properly but not essentially subjoined, viz. (as in the case of an extraneous witness) that, if anything he says should be mendacious, he is liable to be punished for it, as an extraneous witness would be punished. . . . .

Those who may be interested in pursuing the literature upon this subject further are referred to the *Treatise on Evidence* by Chief

Justice Appleton of Maine (1860), to the fourth volume of Professor Wigmore's monumental *Work on Evidence*, and to ex-President Taft's address to the graduating class of Yale University Law School (1905).

The writer has never been able to discern any inherent injustice in compelling the accused to testify. But the question of justice or injustice does not alone dispose of our problem. The supporters of the doctrine of immunity from self-incrimination also base their arguments upon the abuse which they claim existed before the introduction of this principle, and which they claim now exists in countries outside of the domain of the common law, where the principle of immunity from self-incrimination is unknown.

An extended consideration of these arguments would necessarily involve an examination into the history of the privilege and into the administration of the law on the continent of Europe, which the limits of this article do not permit.

The writer discussed the subject from this standpoint in a paper read last October at the congress of the American Prison Association held at Indianapolis, and in the present article will accordingly limit himself to pointing out what he regards as the salient points and the conclusions to be drawn therefrom.

The introduction in Great Britain in the thirteenth century of the system of compulsory examination of the accused constitutes probably the greatest step in advance that has ever been taken in our judicial history. Up to that time the trial of the accused was by "wager of law" which consisted in the accused pronouncing an oath of innocence in company with oath helpers. Successful pronouncement constituted acquittal, failure meant conviction.

The compulsory examination of the accused substituted for this haphazard system an inquiry into the facts of the case, and the principle that the determination should be based upon the facts.

During the succeeding two centuries this system was administered without substantial complaint. There was indeed a bitter controversy as to the extent of the jurisdiction of the church courts, but there never was any question of the propriety of compulsory examination of the accused, where jurisdiction over the subject matter existed. After this period, however, abuse unquestionably did arise, and indeed remained entirely unchecked until the statute of 1533, which for the first time fixed definite preliminary requisites before the accused could be examined. The rather severe criticism

which eventually brought about the enactment of this statute was not at all leveled against compulsory examination of the accused as such, but against the exercise of the right of examination in the absence of a formal complaint and as to offenses concerning which the accused had not been formally charged.

The system of examining the accused had begun to be misused to harass and examine persons against whom there was no shadow of a complaint, or against whom there existed merely suspicion, in an endeavor to discover some offense or other with which they might be charged. This brought about the realization that the right to compulsory examination had proper limitations, and should be confined to cases in which there was some prima facie evidence of guilt, or at least an accusation by responsible public authorities.

It seems, however, that the discussion as to the necessity for these preliminary conditions was carried on so long and waxed so fierce, that the distinction between the conditions under which the inquisitional oath might lawfully or unlawfully be administered was gradually overlooked, and the matter came to be argued as if the examination of the accused were either wholly lawful or wholly unlawful. Both counsel and courts seem to have lost sight of the distinction which had been enacted into statute after so many years' controversy, viz.: that the compulsory examination of the accused was lawful where there had been the proper preliminary foundation, and unlawful where such foundation was absent—and finally, as the result of a series of judicial decisions, the courts about the year 1700 declared that compulsory self-incrimination in any form or under any circumstances was unlawful.

This was judge-made law pure and simple. It was not, as so many seem to believe, the enactment into statute of a principle of human justice or of human rights, but was nothing more or less than the usurpation of legislative power by the courts. This should not be forgotten, because in the United States the privilege of the accused is declared by express constitutional enactment in every state except New Jersey and Iowa, and in these states it is held to be a part of the fundamental law by implication from other provisions of the constitution.

Only recently the Supreme Court of the United States in an opinion by Mr. Justice Moody (Twining *vs.* United States) asserted that the privilege against self-incrimination "is best defended not as

an unchangeable principle of universal justice, but as a law proved by experience to be expedient." In Great Britain, where, as we have seen, the rule originated as judicial legislation, it is no longer of universal application, but has been much weakened by statutory exceptions. For instance in 1883 a statute was passed which expressly permits compulsory self-incrimination in bankruptcy proceedings. The tendency of our own courts today, as every lawyer knows, is to modify and limit the application of the constitutional provisions.

A critical examination of the history of the privilege against self-incrimination leads to the conclusion that its abuse has depended solely upon the conditions under which the compulsory examination of the accused might be invoked, and that under a system of law which made formal accusation by public authorities based upon sufficient prima facie evidence a condition precedent, no such abuse has existed in the past.

Nor does the experience of these countries which permit such examination of the accused tend to weaken our conclusions. It is undeniable that the exercise of the right of compulsory examination upon the continent of Europe has been singularly effective to ascertain guilt. While upon some—but comparatively rare—occasions the right to examine the accused has been conducted to an oppressive degree, such abuse is rendered possible only by the fact that under the continental system, the examining magistrate acts not only as a judicial officer, but also as prosecutor.

In view of this dual function of the examining magistrate, there is lacking any independent judicial arbiter, whose function it is to control and limit the right of examination by confining it to relevant matters, and to prevent abuse whether arising from undue zeal of prosecuting officers, or otherwise, and it is remarkable, in view of this situation, that the abuse of this system on the continent has been so very rare.

This brings us finally to a consideration of a remedy for present conditions.

Our constitutional rule is undoubtedly detrimental to the interests of justice and unduly hampers the proper administration of the criminal law; yet an unlimited right to examine the accused might lead to grave abuse. In the paper which the writer read last October before the congress of the American Prison Association, he suggested as a possible solution that there be permitted a limited

exercise of the right of compulsory examination, which should be surrounded by the safeguards which experience and history have shown not only to be necessary, but to be entirely adequate. This suggestion is that compulsory examination of the accused should be permitted after indictment, but only at a formal hearing before a magistrate, and with the right to the accused to be represented by counsel and to "cross-examine." The prerequisite of an indictment would compel the public authorities in the first instance to present prima facie evidence of guilt, entirely apart from the proposed examination. The magistrate would secure order, prevent abuse, and would restrict the examination to matters relevant to the indictment. The right of representation by counsel and cross-examination would give the accused immediate opportunity of explaining any evidence apparently indicative of guilt.

Since the publication of this suggestion, the writer has received numerous expressions of approval of such a course from judges, public prosecutors and members of the bar, and he hopes that this suggestion will receive serious consideration and discussion by those having the administration of our criminal law and the improvement of our procedure at heart, and that as a result there will be brought about such statutory and constitutional changes as the situation may call for.